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October Term, 1930

No. 584

In the Supreme Court of the United States

YETTA STROMBERG,

Appellant,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA.

Appellee.

Brief of Appellee

Appellant was convicted by the Superior Court of San Bernardino County, California, of a violation of Section 403a of the Penal Code of California which provides as follows:

> "Any person who displays a red flag, banner or badge or any flag, badge, banner, or device of any color or form whatever in any public place or in any meeting place or public assembly, or from or on any house, building or window as a sign, symbol or emblem of opposition to organized government or as an invitation or stimulus to anarchistic action or as an aid to propaganda that is of a seditious character is guilty of a felony."

An appeal was taken from the trial court to the District Court of Appeal, Fourth Appellate District and the decision of the Appellate Court duly affirmed the conviction of Appellant of a violation of Section 403a, which decision is reported in 62 California Appellate Decisions at page 788, under the title People vs. Mintz, Stromberg, et al. A petition was made to the District Court of Appeal for a rehearing and to the Supreme Court of California for a hearing and both petitions were duly denied. This appeal is taken from the decision of the District Court of Appeal, Fourth Appellate District.

The parties hereto have stipulated as to the facts upon which appellant was convicted and the stipulation is printed in the Transcript of Record, pages 24 to 26, and is included in Appellant's Brief. We will, therefore, not repeat the same in our brief.

As stated by Appellant the main purpose of this appeal is to test the constitutionality of Section 403a of the Penal Code, and we respectfully submit the following argument in answer to the contentions presented in Appellant's Brief.

ARGUMENT.

I.

Section 403a of the California Penal Code is Constitutional. It Does Not Violate the 14th Amendment to the Constitution of the United Staes.

It is urged by appellant that Section 403a of the California Penal Code is violative of the due process clause of the 14th Amendment and that it abridges the right of free speech guaranteed by that provision.

Appellee contends that the statute in question is constitutional and in support thereof submits the following:

The freedom of speech guaranteed by the federal constitution is not unlimited and unrestricted, and a state may in the exercise of its police power enact statutes for the protection of the public from utterances and demonstrations which threaten organized government and its overthrow by unlawful means.

Whitney v. California, 274 U. S. 357, 370-73; 71 L. ed. 1095, 1104;
Gitlow v. New York, 268 U. S. 652, 666-668, 69 L. ed. 1138, 1145, 1146, 45 Sup. Ct. Rep. 625, and cases cited.

As the Court concisely stated in *Gitlow v. New York*, 268 U. S. 652, 666, 668, 69 L. ed. 1138, 1146:

> "In short this freedom (of speech) does not deprive a state of the primary and essential right of self preservation, which so long as human governments endure, they cannot be denied. United States ex rel Turner v. Williams, 194 U. S. 279, 294, 48 L. ed. 979, 985, 24 Sup. Ct. Rep. 719. In Toledo Newspaper Co. v. United States, 247 U. S. 402, 419, 62 L. ed. 1186, 1193, 38 Sup. Ct. Rep. 560, it was said: 'The safeguarding and fructification of free and constitutional institutions is the very basis and mainstay upon which the freedom of the press rests, and that freedom, therefore, does not and cannot be held to include the right virtually to destroy such institutions'."

Furthermore, the State of California by its legislature's enactment of Section 403a of the Penal Code has declared that the displaying of a red flag or other badge,

or banner, in the manner and for the purposes therein set forth involves such danger to public welfare and peace, that these acts should be punished in the exercise of its police power. The state having made this determination, we submit that this court must give great weight thereto and resolve every presumption in favor of the constitutionality of the statute.

Whitney v. California, (supra);
Gitlow v. New York, (supra);
Mugler v. Kansas, 123 U. S. 623, 661, 31 L. ed. 205, 210, 8 Sup. Ct. Rep. 273.

In the language of this court in *Great Northern R. Co. v. Minnesota,* 246 U. S. 434, 439, 62 L. ed. 817, 820, 38 Sup. Ct. Rep. 346:

> "This court considers a case of this nature in the light of the principle that the state is primarily the judge of regulations required in the interest of public safety and welfare. Such statutes may only be declared unconstitutional where they are arbitrary or unreasonable attempts to exercise authority vested in the state in the public interest."

The foregoing language was also quoted with approval in *Gitlow v. New York,* (supra), and the *Great Northern R. Co.* case was cited with approval in *Whitney v. California,* (supra).

Appellant argues, however, that the legislature had not determined by the enactment of Section 403a of the Penal Code that the display of a red flag or other banner, in the manner and for the purposes therein provided, constituted acts "so inimical to the general welfare and involved such danger of substantive evil that they may

be penalized" in the exercise of the police power of the state. This contention is in effect based upon the fact that the legislature did not specifically state in Section 403a itself that a danger was recognized from the acts therein prohibited, while in the Criminal Syndicalism Law (*Statutes of California*, 1919, Chapter 188, p. 281) a statement occurs which recites the necessity for the act.

Appellee submits, however, that there is no merit to this contention for this court has expressly stated in the cases of Whitney v. California (supra) and Gitlow v. New York (supra) that *"by enacting the present statute,* the legislature has determined" etc. It is to be noted that the statute involved in the Gitlow case contained no recital as to the necessity for such a law and yet the court held that the enactment of the statute was a determination of the question. In other words this determination is made by the legislature by its mere enactment of the law.

Furthermore the sole purpose of the statement in the act to which appellant refers in his argument was to enable the act as an emergency measure to become effective immediately on its approval by the Governor.

Article IV, section 1, para. 4 of the *California Constitution* provides:

> "The second power reserved to the people shall be known as the referendum. No act passed by the Legislature shall go into effect until ninety days after the final adjournment of the session of the Legislature which passed such act, except acts calling elections, acts providing for tax levies or appropriations for the usual current expenses of the State, and urgency measures necessary for the immediate

preservation of the public peace, health or safety, passed by a two-thirds vote of all the members elected to each house. Whenever it is deemed necessary for the immediate preservation of the public peace, health or safety that a law shall go into immediate effect, a statement of the facts constituting such necessity shall be set forth in one section of the act, which section shall be passed only upon a yea and nay vote, upon a separate roll call thereon; * * *"

Finally the statute in the instant case was sufficiently definite as to the acts which it punished and therefore was a determination by the state that the action prohibited by the state was "inimical to the general welfare and involved such danger of substantive evil, that they may be penalized in the exercise of its police power."

Gitlow v. New York, 69 L. ed. 1146, 268 U. S. 668.

Therefore the only question is whether the Statute constituted an arbitrary and unreasonable exercise of the police power vested in the state. The law on this point was declared in *Gitlow v. New York*, 268 U. S. 652, 659 the court said:

"That utterances inciting to the overthrow of organized government by unlawful means, present a sufficient danger of substantive evil to bring their punishment within the range of legislative discretion, is clear. Such utterances, by their very nature, involve danger to the public peace and to the security of the State. They threaten breaches of the peace and ultimate revolution. And the immediate danger is none the less real and substantial, because the effect of a given utterance cannot be accurately foreseen. The State cannot reasonably be required to

measure the danger from every such utterance in the nice balance of a jeweler's scale. A single revolutionary spark may kindle a fire that, smouldering for a time, may burst into a sweeping and destructive conflagration. It cannot be said that the State is acting arbitrarily or unreasonably when in the exercise of its judgment as to the measures necessary to protect the public peace and safety, it seeks to extinguish the spark without waiting until it has enkindled the flame or blazed into the conflagration. It cannot reasonably be required to defer the adoption of measures for its own peace and safety until the revolutionary utterances lead to actual disturbances of the public peace or imminent and immediate danger of its own destruction; but it may, in the exercise of its judgment, suppress the threatened danger in its incipiency. In People v. Lloyd, supra, p. 35 (136 N. E. 505), it was aptly said:

> " 'Manifestly, the legislature has authority to forbid the advocacy of a doctrine designed and intended to overthrow the government without waiting until there is a present and imminent danger of the success of the plan advocated. If the State were compelled to wait until the apprehended danger became certain, then its right to protect itself would come into being simultaneously with the overthrow of the government, when there would be neither prosecuting officers nor courts for the enforcement of the law.'

"We cannot hold that the present statute is an arbitrary or unreasonable exercise of the police power of the State unwarrantably infringing the freedom of speech or press; and we must and do sustain its constitutionality."

But it is urged by appellant that Section 403a is arbitrary and unreasonable in that it penalizes *all* opposition to organized government, *all* anarchistic action, and *all* seditious propaganda as symbolized by a flag or other emblem.

Section 403a provides:

> "Any person who displays a red flag, banner or badge, or any flag, badge, banner, or device of any color or form whatever in any public place, or in any meeting place or public assembly, or from or on any house, building or window as a sign, symbol, or emblem of opposition to organized government or as an invitation or stimulus to anarchistic action or as an aid to propaganda that is of a seditious character, is guilty of a felony."

Referring first to that portion of this section which interdicts the display of a flag as a symbol of opposition to organized government, we will state at the outset that we do not concur with the holding of the District Court of Appeal when it was said:

> "The constitutionality of the phrase of the section, 'of opposition to organized government' is questionable."

We maintain that this portion of the section is a valid and reasonable exercise of the state's police power.

The statute must be read in the light of Section 4 of the *Penal Code* which provides:

> "The rule of the common law, that penal statutes are to be strictly construed, has no application to this code. All its provisions are to be construed accord-

ing to the fair import of their terms, with a view to effect its objects and to promote justice."

We maintain that the state may constitutionally punish the display of a red flag, etc., as a sign, etc., of opposition to organized government since to advocate the overthrow of all organized government is to necessarily advocate a condition of entire lack of government, a condition of chaos and general lawlessness.

While it might be true that the state could not enact a law which interdicted the advocacy of the overthrow of this government, and the substituting of another form of government in its place, yet it would seem that where the overthrow of all organized government is advocated that the state should be entitled to punish such action on the ground that in effect an entire absence of all law and order has been instigated, and furthermore that the teaching of such doctrines threatens breaches of the peace. We submit that this court may take judicial notice of the fact that an entire absence of government would result in disorder, chaos and lawlessness.

An examination of the authorities cited by appellant discloses that in each instance, while the courts say that a peaceful change in *form* of government may lawfully be advocated, yet we have found no decision which states that the abolition of *all* organized government may be lawfully urged.

We therefore maintain that the portion of section 403a which refers to "opposition to organized government" is a valid exercise of the police power. Even assuming for the purpose of argument, however, that this portion of the statute is unconstitutional it is nevertheless sev-

erable from the remaining portions of the act which are entirely valid.

The question as to the severability of these portions of Section 403a is one of interpretation of state statutes.

The District Court of Appeal has interpreted Section 403a in this regard as follows:

> "'Where only part of a statute is invalid for any reason, in order to render the whole statute void for the same reason, all of the parts thereof must be so interdependent as that no one part may be eliminated without destroying the force of the whole statute; but where a statute is valid in one part, and invalid in another, the former part, if not dependent in any measure upon the latter, and can without the latter, accomplish one or all the material purposes of the act, will be sustained, and that which is void will be eliminated and disregarded. It follows that the court will not declare an entire act unconstitutional where the objectionable part can be eliminated without destroying the efficacy of the remainder. The effect of such partial invalidity will then be, that the independent provision, not in its nature and connections essential to the law, may be treated as a nullity, leaving the rest of the enactment, if it comprehend within itself an entire and complete scheme, to stand as valid.' (5 Cal. Jur. 644.)
>
> "(Mordecai v. Board of Supervisors, 183 Cal. 434; Hunt v. Superior Court, 178 Cal. 470; Ex Parte Cerino, 143 Cal. 412; Johnson v. Tautphaus, 127 Cal. 605; Murphy v. Pacific Bank, 119 Cal. 334; Christy v. Supervisors of Sacramento County, 39 Cal. 3; People v. Barbiere, 33 Cal. App. 770; In re Mitchell, 19 Cal. App. 567; Maclay v. Love, 25 Cal. 367; Matter of Bonds of San Joaquin Irrigation District, 161

Cal. 345; McGowan v. McDonald, 111 Cal. 57.)" (Transcript of Record, para. 71, pp. 13 and 14.)

This interpretation by the State Court is binding upon this Court.

Dorchy v. Kansas, 264 U. S. 286, 44 Sup. Ct. Rep. 323, 68 L. Ed. 686;

Gatewood v. North Carolina, 203 U. S. 531, 543, 51 L. Ed. 305, 310, 27 Sup. Ct. Rep. 167;

Guinn v. United States, 238 U. S. 347, 366, 59 L. Ed. 1340, 1348, L. R. A. 1916A, 1124, 35 Sup. Ct. Rep. 926;

Schneider Granite Co. v. Gast Realty and Investment Co., 245 U. S. 288, 290, 62 L. Ed. 292, 294, 38 Sup. Ct. Rep. 125.

Therefore even conceding that the phrase of the section which refers to "opposition to organized government" is unconstitutional, still, if the remaining portions are valid, no objection can be made to the validity of the statute. It is our contention that the remaining provisions of the statute relating to "anarchistic action" and "seditious propaganda" constitute a reasonable and valid exercise of the state's police power.

As above stated the law is well settled to the effect that a state may prevent utterances or acts which incite the overthrow of organized government by unlawful means. *Gitlow v. New York,* supra.

In determining whether or not that portion of section 403a which refers to "anarchistic action" and "seditious propaganda" is a constitutional exercise of the police power it is necessary to determine whether these portions of the section punish utterances or acts which incite the overthrow of organized government by unlawful means.

We must necessarily look to definitions of the terms "anarchy" and "sedition." Referring first to anarchy we find that the District Court of Appeal stated in its opinion (Tr. Rec., p. 10, par. 63):

> "The words 'anarchy' and 'sedition' have well defined meanings, and the teaching of anarchy and sedition as understood by the laws of our land can well be prohibited by a constitutional statute.
>
> "Webster's dictionary defines an anarchist as follows:
>
> "'One who advocates anarchy or believes in anarchism; one who attempts to establish anarchy; especially, one who believes in or practices terroristic anarchism; a terrorist; a nihilist.'
>
> "The same authority defines anarchy as:
>
> "'Absence of government; the state of society where there is no law or supreme power; hence, a state of lawlessness or political disorder; specifically, the social state that is advocated by modern anarchists.'
>
> "Black's Law Dictionary, second edition at page 68 defines an anarchist as:
>
> "'One who professes and advocates the doctrine of anarchy.'
>
> "The same authority defines 'anarchy' as:
>
> "'Destructive of government, lawlessness; the absence of all political government; by extension, confusion in government.'
>
> "In Cerveny v. Chicago Daily News (28 N. E. 692), the court said:
>
> "'It was charged that the defendant falsely and maliciously published of the plaintiff language which is literally transcribed in the decla-

ration charging that the plaintiff is an "Anarchist." An "Anarchist" is defined by Webster to be: "An anarchist; one who excites revolt, or promotes disorder in a state," and this we assume to be a sufficiently accurate definition of the word. It is, moreover, here alleged that, at the time and place of the publication complained of, it was commonly understood and believed that "the doctrines, opinions, beliefs, teachings, and tenets of said class, party, or sect called 'anarchist,' as aforesaid, and of the persons composing said class, party, or sect, is that the law and order of society then, and ever since then, and now, existing should be overthrown by revolution and force." It can not, therefore, be correctly said that this is no more than charging the plaintiff with being a member of a certain political party; for anarchy, being the enemy of all governments, is necessarily the reverse of a political party, which is always in support of some form of government, and, professedly, of that which is best.'"

"In Lewis v. Daily News Co. of Cumberland 32 Atl. 246), the court said:

"'Falsely publishing of an individual that he is an anarchist is libelous.' (Cerveny v. News Co., 28 N. E. 692.) 'The declaration alleges that an anarchist is universally accepted by all law abiding persons in all countries as meaning an enemy and conspirator against all law and social order, and as one who uses unlawful, violent, and felonious means to destroy property and human life, and as one who is treasonable to the government under which he lives and employs assassination of persons in authority as means of accomplishing his unlawful designs

against society. Obviously, then to publish of and concerning an individual that he is such an enemy of law, of order, of society, and of human life, is grossly libelous, and is far from merely charging him, as suggested in the argument, with being only a political propagandist, advocating visionary schemes; for anarchy; as defined in the declaration, and as generally understood, is avowed hostility to all governments, and open antagonism to all political parties, everyone of which professes to support some form of government, and generally that which its members consider the best. It can not be doubted that all law-abiding, right-thinking men regard with abhorrence the individual who justifies or approves of bloody and atrocious means to which anarchists resort, the world over, in furtherance of their reckless and revolutionary designs, against every form of government and against every right of property. It is equally apparent that to accuse another of being an anarchist in the sense in which the term is generally accepted is to accuse him of that which will inevitably injure his reputation, and expose him to obloquy and ignominous reproach.'

"In People v. Most (73 N. Y. Supplement, 220), the court said:

"'We hold that the teachings of the doctrine of anarchy, "seriously disturb or endanger the public peace"; and also "openly outrage public decency." To give this construction to the law in no way abridges the liberty of conscience in matters of religion, nor the freedom of speech on all questions of government or of social life, nor does it in any way trespass upon the proper

freedom of the press. The point and pith of the offense of anarchists is that they teach the doctrine that the pistol, the dagger, and dynamite may be used to destroy rulers. The teaching of such horrid methods of reaching an end is the offense. It is poor satisfaction, when one of their dupes has consummated the results of their teaching, to catch him, and visit upon him the consequences of his acts. The evil is untouched if we stop there. In this class of cases the courts and the public have too long overlooked the fact that crimes and offenses are committed by written or spoken words. We have been punishing offenders in other lines for words spoken or written without waiting for an overt act of injury to persons or property. The press is restrained by the law of libel from the too free use of words. Individuals can be punished for words spoken or written, even though no overt act of physical injury follow. It is the power of words that is the potent force to commit crimes and offenses in certain cases. No more striking illustration of the criminal power of words could be given, if we are to believe the murderer of our late president than that event presents. The assassin declares that he was instigated and stimulated to consummate this foul deed by the teachings of Emma Goldman. He is now awaiting execution for the crime, while she is still at large in fancied security. A person may advocate any change of our government by lawful and peaceful means, or may criticise the conduct of its affairs and get as many people to agree with him as he can, so long as he does not advocate the commission of crime as the means through which he is to

attain his end. If he advocates stealthy crime as the means of reaching his end, he by that act, commits a crime for which he can be punished. The distinction we have tried to point out has been too long overlooked. If our conclusions are sound, it is the teachers of the doctrine who can and ought to be punished. It is not necessary to trace and establish the connection between the teaching of anarchy and a particular crime of an overt nature. It is a strange spectacle in this age for a great nation to stand mute and paralyzed in the presence of teachers of crime that are advocated only for the purpose of destroying such nation, and it have no power to defend against such internal enemies. We do not believe the arm of the law is too short to reach those offenders against the life of the nation, or too paralyzed to deal with them. The liberty of conscience, the freedom or speech, or the freedom of the press, do not need such concessions to save to the fullest extent unimpaired those sacred rights of a free people.'" (Transcript of Record, para. 64, 65, 66, 67, 68, and 69, pp. 10, 11, 12, and 13.)

The District Court of Appeal of California, after citing the foregoing authorities, makes the following comment:

"It is therefore clear that when section 403a of the Penal Code prohibits a display of a red flag as an invitation or stimulus to anarchistic action it prohibits acts which have a well-defined and well-settled meaning in the law of our land, a teaching which if allowed to be put into force and effect would mean revolution in its most dreaded form." (Transcript of Record, para. 69, p. 13.)

We submit that the foregoing conclusion of the court is entirely sound.

In other words the use of the language in the statute above quoted is susceptible of only one logical and reasonable interpretation, namely, that the display of a red flag or banner for the purpose of stimulating the overthrow of government by violent and unlawful means is prohibited.

The District Court of Appeal further states with reference to that portion of the opinion which refers to seditious propaganda.

> "The section in question also prohibits the display of a red flag as an aid to propaganda that is of a seditious nature. Black's Law Dictionary, second edition, page 1067, gives the following definition of 'sedition':
>
> "'An insurrectionary movement tending towards treason, but wanting an overt act; attempts made by meetings or speeches, or by publications, to disturb the tranquillity of the State.'
>
> "So, also, in Wilkes vs. Shields (64 N. W. 921), the court said:
>
> "'The obvious meaning of the words "seditious agitator," as they would naturally be understood by ordinary men, when published in reference to another, is that he is a disturber of the public peace and order, a subverter of just laws, and a bad citizen.'

"In the case of Arizona Publishing Company vs. Harris (181 Pac. 373), 'sedition' is defined as follows:

> " 'Sedition is the raising of commotion or disturbances in the State; it is a revolt against legitimate authority.'

"We therefore conclude that the term 'sedition' and the word 'seditious' have well-defined meanings in law. That the teaching of sedition against our Government can be and has long been prohibited needs no further citation of authorities.

"As we view the provisions of section 403a of the Penal Code, its prohibition of displaying a red flag 'as an invitation or stimulus to anarchistic action, or as an aid to propaganda that is of a seditious character' is certain, and a proper and constitutional and legislative enactment. It is not contrary to the provisions of either the State or Federal Constitutions guaranteeing freedom of speech to our people." (Transcript of Record, para. 69 and 70, p. 13.)

Here again we maintain that the conclusions reached by the District Court of Appeal to the effect that the terms "sedition" and "seditious" have well defined meanings and that such activities against our government may be prohibited by statute are sound.

In other words, it may be stated that the statute's reference to anarchistic and seditious activities has, contrary to the claim of appellant, only one reasonable interpretation, namely, activities which advocate the unlawful and violent overthrow of organized government. Therefore, we submit that the statute is not an arbitrary and unreasonable exercise of police power inasmuch as

it comes within the rule announced in the Gitlow case, namely, "That utterances inciting to the overthrow of organized government by unlawful means present a sufficient danger of substantive evil to bring them punishment within the range of legislative discretion is clear."

II.

Section 403a of the California Penal Code is Not Void for Uncertainty.

It is urged that Section 403a of the Penal Code is void for uncertainty in that it penalizes "anarchistic action." This phrase, it is asserted, is susceptible of two interpretations, one which merely connotes a new political theory and the other the overthrow of the government by violent means. Therefore, appellant maintains that the statute is so indefinite that it cannot be known what is forbidden.

As stated under our Point I, we contend that the language of the statute in this regard is very definite and certain, and susceptible of only one interpretation. It will be noted that the statute punishes the display of a red flag, etc., "in any public meeting place or public assembly, or from any house, building, or window, * * * as an *invitation or stimulus to anarchistic action* * * *."

We submit that to give this language its fair and reasonable import, as we are required to do by Section 4 of the Penal Code (supra), we must necessarily conclude that it punishes not the mere belief in a political theory but *the display of a red flag as an invitation or stimulus to the overthrow of the government by means of force and violence.* This is true since the language

refers not to merely a belief in anarchistic doctrines, but to *stimulating and inviting anarchistic action.*

An examination of definitions will be of value. While, as pointed out by appellant, Webster defines an anarchist as "one who advocates anarchy or the absence of government as a political ideal," yet Webster continues, "in popular use, one who seeks to overturn by violence all constituted forms and institutions and all rights of property, with no purpose of establishing any other system of order in the place of that destroyed."

By virtue of Section 4 of the *Penal Code,* it is the foregoing definition which must be applied to the term "anarchistic action." Again we wish to refer this court to the definitions of the terms "anarchy", and "anarchist" as quoted in the Opinion of the District Court of Appeal and set forth herein under our Point I.

For example, in *Cerveny v. Chicago Daily News,* 28 N. E. 692, the court held that the doctrines and teachings of anarchy are that the law and order of society should be overthrown by revolution and force.

Also in *People v. Most,* 13 N. Y. Supp. 220, the court said:

> "The point and pith of the offense of anarchists is that they teach the doctrine that the pistol, the dagger, and dynamite may be used to destroy others."

Keeping in mind the meaning of the terms "anarchy" and "anarchist", let us examine the definition of the word "action."

Webster defines "action" as follows:

"The function or operation of that which acts; the doing of something; *the effecting of an alteration by means of force* or some natural power or virtue."

Thus it would seem quite clear that the statute in question is very definite and certain in that it does not refer to the mere belief in a doctrine of anarchy but to the execution of the prineiples of that doctrine by immediate action, which, according to Webster, implies the use of force.

Appellant also asserts that section 403a is void for uncertainty because the clause which punishes the display of a red flag, etc., as "an aid to propaganda that is of a seditious character," is uncertain as to meaning.

Here again we must turn to definitions.

Webster defines "sedition" in the following language:

"1. A commotion, or the raising of a commotion, in a state not amounting to an insurrection; conduct tending to treason, to-wit, an overt act; excite man or discontent against the government, the resistance to lawful authority.

"2. Dissension, division, schism."

Black's Law Distionary, Second Edition, at page 1067, gives the following definition of "sedition":

"An insurrectionary movement tending towards treason, but wanting an overt act; attempts made by meetings or speeches, or by publications, to disturb the tranquillity of the state."

So, also, in *Wilkes vs. Shields,* 64 N. W. 921 (Minn.) the court said:

> "The obvious meaning of the words 'seditious agitator,' as they would naturally be understood by ordinary men, when published in reference to another, is that he is a disturber of the public peace, and order, a subverter of just laws, and a bad citizen."

In the case of *Arizona Publishing Company vs. Harris*, 181 Pac. 373, "sedition" is defined as follows:

> "The raising of commotions and disturbances in the state; it is a revolt against legitimate authority." (Citing *Bouvier's Law Dictionary*, page 303 (sedition).)

In view of these definitions we contend that the statute is quite definite and certain when it says "as an aid to propaganda that is of a seditious character" for it refers to propaganda "tending towards treason" which "disturbs the tranquillity of the state, disturbs the public peace, and "revolts against legitimate authority."

We therefore submit that appellant's contention that Section 403a is void for uncertainty is without merit.

III.

The Question as to the Constitutionality of Section 403a as Applied Is Not Reviewable on the Record in This Court.

It is contended by appellant that if this court should hold any portion of the statute in question unconstitutional, that the entire section must also be held unconstitutional since it is impossible to determine from the gen-

eral verdict of the jury which part of the statute they concluded that appellant had violated.

In other words, appellant seeks to have this court declare: first, that section 403a of the *Penal Code* of California is unconstitutional as to that portion referring to the display of a flag as an emblem of opposition to organized government; and second, that applying the entire statute to this case there has been an arbitrary and unreasonable exercise of the police power of the state infringing appellant's liberty in violation of the due process clause of the 14th Amendment to the United States Constitution.

Assuming, for the purpose of argument, that this court should hold section 403a invalid in part, we maintain that the question as to whether or not the general verdict of guilty may be referred to the remaining valid portions of the statute is one to be determined by the state court only and cannot properly be considered by this court. In other words, this court cannot determine on this appeal whether a general verdict of guilty may be referred to the valid or invalid portions of the statute under which a conviction was had, because no federal question is presented.

Furthermore, an examination of the record on this appeal discloses that no other federal question than the inherent constitutionality of 403a has been presented to or passed upon by either the Trial Court or District Court of Appeal. Failure to present a federal question precludes appellant from presenting it for the first time in this court.

In *Whitney vs. California*, 274 U. S. 357, 362, 71 L. ed. 1095, 1100, the court said:

"We proceed to the determination, upon the merits, of the constitutional question considered and passed upon by the Court of Appeal. Of course our review is to be confined to that question, since it does not appear, either from the order of the Court of Appeal or from the record otherwise, that any other Federal question was presented in and either expressly or necessarily decided by that court. First National Bank v. Kentucky, 9 Wall. 353, 363, 19 L. Ed. 701; Edwards v. Elliott, 21 Wall. 532, 557, 23 L. Ed. 487; Dewey v. Des Moines, 173 U. S. 193, 200, 19 S. Ct. 379, 43 L. Ed. 665; Keokuk & Hamilton Bridge Co. v. Illinois, 175 U. S. 626, 633, 20 S. Ct. 205, 44 L. ed. 299; Capital City Dairy Co. v. Ohio, 183 U. S. 238, 248, 22 S. Ct. 120, 46 L. Ed. 171; Haire v. Rice, 204 U. S. 291, 301, 27 S. Ct. 281, 51 L. Ed. 490; Selover, Bates & Co. v. Walsh, 226 U. S. 112, 126, 33 S. Ct. 69, 57 L. Ed. 146; Missouri Pacific Railway v. Coal Co., 256 U. S. 134, 135, 41 S. Ct. 404, 65 L. Ed. 864. It is not enough that there may be somewhere hidden in the record a question which, if it had been raised, would have been of a Federal nature. Dewey v. Des Moines, supra, 199 (19 S. Ct. 379); Keokuk & Hamilton Bridge Co. v. Illinois, supra, 634 (20 S. Ct. 205.)"

In order to escape the effect of the foregoing authorities appellant by her last point claims that she did by timely objection preserve the question of the constitutionality of Section 403a as applied in the instant case.

The rule in this connection is that, before this court can hold the entire statute as applied to the particular facts presented in this case violative of the due process clause of the federal constitution, it must first appear that timely objection was made specifying the particulars

in which the statute, as applied under the charge, would be repugnant to the 14th Amendment.

Fiske v. Kansas, 274 U. S. 380.

In the Fiske case the record disclosed that the defendant at the outset moved to quash the indictment for the reason

> "* * * that it failed to specify the character of the organization in which he was alleged to have secured members. This was overruled."

In *Whitney v. California*, 274 U. S. 357, 362, the court said:

> "And here, since it *appears from the statement* in the order of the Court of Appeal that the question whether the Syndicalism Act *and its application in this case* was repugnant to the due process and equal protection clauses of the Fourteenth Amendment, *was considered and passed upon by that court* —this being a Federal question constituting an appropriate ground for a review of the judgment—we conclude that this Court has acquired jurisdiction under the writ of error. The order dismissing the writ for want of jurisdiction will accordingly be set aside." (Italics ours.)

In the instant case the record merely discloses that a general demurrer was filed and that in arguing this demurrer defendant's counsel generally urged the unconstitutionality of Section 403a as violative of the 14th Amendment to the Federal Constitution. (Tr. of Rec., 25 and 26.) Nowhere does it appear in the record that defendant ever urged or presented for consideration to any of the state courts the question of the unconstitu-

tionality of the statute as applied in the case at bar.

Under these circumstances the point has not been properly preserved for review by this court.

Conclusion.

In conclusion, we wish to call this Court's attention to the fact that the evidence overwhelmingly supports appellant's conviction on all three portions of Section 403a of the Penal Code of California. There can be no question but that there was ample evidence to justify the jury's verdict in finding appellant guilty of displaying a red flag, as a sign or symbol of opposition to organized government, of displaying a red flag as an invitation or stimulus to anarchistic action and of displaying a red flag, as an aid to propaganda of a seditious character. Appellant, an American citizen of Russian parentage, was deliberately training children of immature years, incapable of forming an independent judgment, to become traitors to their country and was teaching them doctrines which advocate the overthrow of our government by violent and unlawful means. This fact was evidenced by the Communist literature prepared for the use of the children which disclosed the radical and revolutionary principles of the Communist party, and also by the pledge which the children took each morning as they stood at attention and saluted the red flag. They repeated, "We pledge allegiance to the Workers' Red Flag and the cause for which it stands." We quote in this regard from the opinion of the District Court of Appeal:

> "In reading the foregoing extracts from the literature at the camp we must bear in mind that appel-

> lant was on the committee which organized and had charge at the camp, that she was present each time the red flag was raised and led the children in the pledge of allegiance to the flag 'and to the cause for which it stands,' and that the literature from which we have quoted, discloses the cause for which the red flag stands, a cause which advocates wholesale murder in the most terrible form of revolution. Under these circumstances there is more than ample evidence to sustain the conviction of appellant, Yetta Stromberg." (Trans. of Record, page 18, para. 81.)

We maintain that there is no merit in the contention that the actions of appellant were entirely harmless. While it is true that the children she was training would not be likely to commit immediately any acts of violence, yet she was creating in them the spark which, when fanned, might burst into a great conflagration. As stated by this Court in *Gitlow v. New York,* 69 L. ed. 1146, 268 U. S. 652, 669:

> "The State cannot reasonably be required to measure the danger from every such utterance in the nice balance of a jeweler's scale. A single revolutionary spark may kindle a fire that, smouldering for a time, may burst into a sweeping and destructive conflagration. It cannot be said that the State is acting arbitrarily or unreasonably when in the exercise of its judgment as to the measures necessary to protect the public peace and safety, it seeks to extinguish the spark without waiting until it has enkindled the flame or blazed into the conflagration. It cannot reasonably be required to defer the adoption of measures for its own peace and safety until the revolutionary utterances lead to actual disturbances

of the public peace or imminent and immediate danger of its own destruction; but it may, in the exercise of its judgment, suppress the threatened danger in its incipiency."

Appellee therefore respectfully submits that Section 403a of the *Penal Code* of California is a valid and reasonable exercise of the State's police power and is not violative of the 14th Amendment of the Constitution of the United States. The judgment of the District Court of Appeal of California should therefore be affirmed.

Respectfully submitted,

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